

IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

MICHAEL H. GROVE,

Petitioner-Appellant,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent-Appellee.

NO. 20882

APPELLEE'S BRIEF

Appeal from the United States  
District Court for the Northern  
District of California  
Southern Division

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**FILED**

JUL 6 1966

WM. B. LUCK, CLERK

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FOR THE NINTH CIRCUIT

Respondent-Appellee.

NO. 20882

## JURISDICTION

Court to entertain appellant's petition for a writ of habeas corpus was conferred by Title 28, United States Code section 2248. The jurisdiction of this Court is conferred by Title 28, United States Code section 2253, which makes a final order in a habeas corpus proceeding reviewable in the Court of Appeals when, as in this case, a certificate of probable cause has been issued.

## STATEMENT OF THE CASE

Appellant, petitioner below, has appealed from an order of the United States District Court for the Northern District of California, Southern Division,





denying his application for a writ of habeas corpus.

A. Proceedings in the State Courts

On August 30, 1962, appellant Michael H. Grove, was convicted in the Superior Court of San Diego County upon his plea of guilty, while represented by appointed counsel, of the felony offense of first degree murder in violation of California Penal Code section 187. He was sentenced on that same day to imprisonment in the State prison for the term prescribed by law.

The appellant did not appeal the above conviction. Rather, three years later, he filed a petition for writ of habeas corpus in the Superior Court of Marin County. That petition was denied on September 20, 1965. Thereafter, appellant filed a similar habeas corpus petition in the California Supreme Court which was denied without opinion on October 20, 1965. Substantially, the same factual and legal issues now presented to this Court were raised in those petitions.

B. Proceedings in the Federal Courts

On October 29, 1965, appellant filed an application for a writ of habeas corpus in the United States District Court for the Northern District of California, Southern Division. The Honorable William T. Sweigert denied appellant's petition for a writ of habeas corpus by an order filed on January 11, 1965, without issuing



an order to show cause. The basis of the Court's order was that the rule announced in Escobedo v. Illinois, 378 U.S. 478 (1964) does not apply retrospectively. On March 23, 1966, Judge Sweigert granted petitioner's application for a certificate of probable cause and for leave to appeal in forma pauperis.

A notice of appeal was filed by appellant on January 21, 1966.

In his petition to the District Court appellant alleged his plea of guilty was prompted by a confession obtained in violation of the Escobedo rule. Appellant also contended the failure to afford him counsel at his prearraignment questioning in violation of the Escobedo rule constituted ineffective aid of counsel. Appellant argued further that his plea was premised on a confession obtained by threats and promises of leniency.

#### APPELLANT'S CONTENTIONS

On this appeal appellant contends his plea of guilty was (1) coerced by a confession which was both involuntary and obtained in violation of the Escobedo rule, and, (2) vitiated because of ineffective aid of counsel. Appellant thus poses the question whether these allegations present grounds for relief on habeas corpus.

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## SUMMARY OF APPELLEE'S ARGUMENT

I. Petitioner's plea of guilty forecloses collateral attack on his conviction on the alleged ground that it resulted from an illegally obtained confession.

II. The Escobedo rule does not apply retroactively.

III. Appellant's voluntary plea of guilty prevents collateral attack on his judgment of conviction on the asserted ground of ineffective representation by counsel.

## ARGUMENT

### I

PETITIONER'S PLEA OF GUILTY FORECLOSES  
COLLATERAL ATTACK ON HIS CONVICTION ON  
THE ALLEGED GROUND THAT IT RESULTED FROM  
AN ILLEGALLY OBTAINED CONFESSION.

This Court may take judicial notice of appellant's judgment of conviction in the Superior Court of the State of California for the County of San Diego on October 30, 1962. Kasey v. Molybdenum Corporation of America, 336 F.2d 560, 561 (9th Cir. 1964); Smith v. Settle, 212 F.Supp. 622 (D.C. Mo., 1962); U.S. Ex rel. Holly v. Keenan, 107 F.Supp. 266 (D.C. Pa. 1952). This judgment, which does not appear in the record on appeal, is attached as Exhibit "A" of this brief for the convenience of the Court. This judgment indicates that appellant entered a plea of guilty, while represented by counsel, to the crime of murder of the first degree.



Appellant's conviction and sentence therefore are based solely and entirely upon his plea of guilty and not upon any evidence which may have been improperly acquired by the prosecuting authorities. Townsend v. Burke, 334 U.S. 736 (1948); Wallace v. Heinze, 351 F.2d 39 (9th Cir. 1965); Davis v. United States, 347 F.2d 374 (9th Cir. 1965); Harris v. United States, 338 F.2d 75 (9th Cir. 1964). Even if appellant's decision to plead guilty was influenced by the antecedent obtaining of an allegedly inadmissible confession, the federal courts have consistently held that the claim that inadmissible evidence induced a plea of guilty is no basis for setting aside a conviction. Sullivan v. United States, 315 F.2d 304 (9th Cir. 1963), cert. denied, 375 U.S. 910; Morse v. United States, 295 F.2d 30 (8th Cir. 1961); United States v. Miller, 293 F.2d 697 (2d Cir. 1961); Watts v. United States, 278 F.2d 247 (D.C. Cir. 1960); United States v. Kniess, 264 F.2d 353 (7th Cir. 1958), cert. denied, 359 U.S. 947; Waley v. Johnston, 137 F.2d 117 (9th Cir. 1944), cert. denied, 321 U.S. 779. Having entered a plea of guilty while represented by counsel, appellant cannot now attack his conviction on the ground that an involuntary confession induced that plea.





## II

### THE ESCOBEDO RULE DOES NOT APPLY RETROACTIVELY.

In both his petition to the District Court of Appeal for a writ of habeas corpus, and his brief to this court seeking reversal to the order denying the writ, appellant also bases his attack upon his state conviction on the retroactive application of Escobedo v. Illinois, 378 U.S. 478 (1964). He contends that the charges to which he pled guilty were supported in part by statements elicited from him in violation of the Escobedo rule.

This case is governed by Johnson v. New Jersey, 34 U.S. L.Week 4592 (June, 1966), in which the Supreme Court of the United States has definitely declared that Escobedo affects only those cases in which the trial began after June 22, 1964, the date of that decision. As noted above, the proceedings which culminated in the judgment that petitioner now seeks to collaterally attack began and were concluded in 1962, long before the date of the Escobedo decision. Consequently, appellant's petition to the District Court did not state grounds for relief and was properly denied.

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### III

#### APPELLANT'S VOLUNTARY PLEA OF GUILTY PREVENTS COLLATERAL ATTACK ON HIS JUDGMENT OF CONVICTION ON THE ASSERTED GROUND OF INEFFECTIVE REPRESENTATION BY COUNSEL.

Appellant here argues that he entered his plea of guilty upon the advice of counsel. Appellant's argument, however, is not that he was deprived of effective aid of counsel. Rather, appellant argues lack of assistance of counsel in violation of the Escobedo rule.

"It is not that appellant puts the blame on counsel so much as the fact that in all probability counsel was right in his urging appellant to enter a plea of guilty simply because he was aware that the conviction was already assured by the illegally obtained confession." [Emphasis added] (AOB 9-10).

Appellant, it would appear, has merely couched his Escobedo argument in language that suggests appellant was deprived effective aid of counsel. Appellant's essential contention, however, is that he was denied right to counsel in violation of the Escobedo rule. The Escobedo rule, however, does not apply retroactively (see Argument II, supra) and therefore appellant does not state grounds for relief.



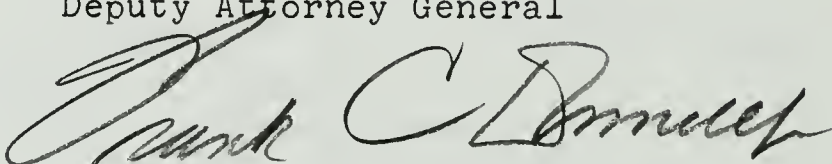
CONCLUSION

For the reasons stated above, it is respectfully submitted that the order of the District Court denying appellant's petition for a writ of habeas corpus should be affirmed.

DATED: July 5, 1966.

THOMAS C. LYNCH, Attorney General  
of California

ROBERT R. GRANUCCI  
Deputy Attorney General

A handwritten signature in dark ink, appearing to read "Frank C. Damrell, Jr.", written in a cursive style.

FRANK C. DAMRELL, JR.  
Deputy Attorney General

Attorneys for Respondent-Appellee

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CR-SF  
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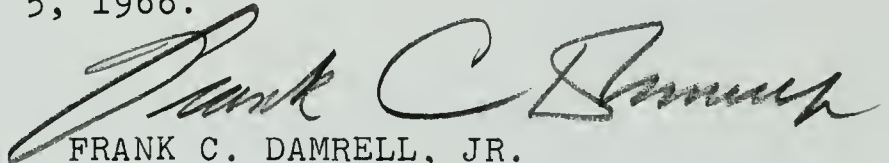


CERTIFICATE OF COUNSEL

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit and that in my opinion this brief is in full compliance with these rules.

DATED: San Francisco, California

July 5, 1966.

A handwritten signature in dark ink, appearing to read "Frank C. Damrell, Jr.", written in a cursive style.

FRANK C. DAMRELL, JR.  
Deputy Attorney General  
of the State of California





E X H I B I T "A"



In the Superior Court of the State of California  
IN AND FOR THE COUNTY OF SAN DIEGO

Department No. KK 9

No. CR 4445

FOR FILE STAMP

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G. O. F. E. M. I. N. D. E

ABSTRACT OF JUDGMENT  
(Commitment to State Prison)

THE PEOPLE OF THE STATE  
OF CALIFORNIA,

Plaintiff,

vs.

MICHAEL H. GROVE

Defendant

Present:

Hon. GERALD C. THOMAS  
Judge of the Superior Court

James Don Keller, District Attorney

By R.J. HANSCOM Deputy

JERRY DUKE  
Counsel for Defendant

THIS CERTIFIES that on the 30th day of October 1962, judgment  
of conviction of the above named defendant was entered as follows:

(1) Case No. CR 4445 Count No. 1 on his plea of Guilty

he was convicted by Court

(Court or jury)

of Murder, which upon due proof the Court fixed the degree thereof  
(designation of crime and degree, if any, including fact that it constitutes a second or subsequent, if that affects sentence)  
as Murder in the first degree

in violation of (PC 187)

(reference to code or statute, including section and subsection thereof, if any violated)

With prior felony convictions as follows:

Date	County and State	Crime	Disposition
None			

THE WITHIN INSTRUMENT IS A  
CORRECT COPY OF THE ORIGINAL  
ON FILE IN THIS OFFICE

ATTEST:

L. E. WILSON, WARDEN

CALIF. STATE PRISON

BY *W. J. H. H.*

RECORDED BY OFFICE

(AFFIX SEAL)

EXHIBIT A

Defendant was not armed with a deadly weapon at the time of his commission of the  
(was or was not)  
offense, or a concealed deadly weapon at the time of his arrest within the meaning of Penal Code  
Section 3024

(repeat foregoing with respect to each count of which defendant was convicted)



(2) Defendant was not <sup>(was or was not)</sup> adjudged an habitual criminal within the meaning of subdivision <sup>(a) or (b)</sup> of section 644 of the Penal Code and the defendant <sup>(is or is not)</sup> is not an habitual criminal in accordance with the provisions of subdivision (c) of that section.

(3) It is, therefore, ordered, adjudged and decreed that the said defendant be punished by imprisonment in the state prison of the State of California for the term provided by law, and that he be remanded to the Sheriff of the County of San Diego, and by him delivered to the Director of Corrections of the State of California at California Institution for Men at Chino, forthwith

It is Ordered that sentences shall be served in respect to one another as follows: (c/c or c/s)

and in respect to any prior incompleated sentences as follows: (c/c or c/s)

(4) To the Sheriff of the County of San Diego, and to the Director of Corrections at California Institution for Men at Chino,

Pursuant to the aforesaid judgment, this is to command you, the said Sheriff, to deliver the above named defendant into the custody of the Director of Corrections at California Institution for Men at Chino, Forthwith.

WITNESS my hand and Seal of said Court this 30th day of October 1962.

R. B. JAMES, Clerk.

By Heber Lewis  
HEBER LEWIS Deputy

STATE OF CALIFORNIA, )  
County of San Diego, ( ss.

I DO HEREBY CERTIFY the foregoing to be a true and correct abstract of the judgment duly made and entered on the minutes of the Superior Court in the above entitled action as provided in Penal Code section 1213.

ATTEST my hand and seal of the Superior Court this 30th day of October, 1962.

R. B. JAMES,  
County Clerk and ex-officio Clerk of the Superior Court of the State of California, in and for the County of San Diego.

By Heber Lewis  
HEBER LEWIS Deputy

Gerald C. Thomas  
Judge of the Superior Court of the State of California, in and for the County of San Diego.  
GERALD C. THOMAS

THE WRITING OF THIS IS A  
CORRECT COPY OF THE  
ON FILE IN THIS OFFICE  
ATTEST:

BY W. Schenck  
W. Schenck

(AFFIX SEAL)

FORM 1A CO. CLK. 11-60 2M PLAZA

